Missouri Court of Appeals
Southern District

In Division

STATE OF MISSOURI,

Respondent,

v.

FABAYAN L. LARRY,

Appellant.

No. SD38987

Filed: June 15, 2026

APPEAL FROM THE CIRCUIT COURT OF SCOTT COUNTY

Honorable Robert Z. Horack, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS

Fabayan L. Larry ("Appellant") appeals the judgment of the Circuit Court of Scott County, Missouri ("trial court") convicting him on three counts: Count 1, murder in the first degree (§ 565.020); Count 2, kidnapping in the second degree (§ 565.120); and Count 3, armed criminal action (§ 571.015).[1] Appellant asserts four points of error. We

[1] All statutory references are to RSMo (2016).

remand for the trial court to enter an order *nunc pro tunc* correcting the written judgment to conform Appellant's sentence on Count 1 to the trial court's oral pronouncement of sentence. In all other respects, we affirm.

Factual and Procedural Background

Appellant does not contest the sufficiency of the evidence. Thus, we view all evidence in the light most favorable to the verdict and grant the State all reasonable inferences. ***State v. Soliben***, 621 S.W.3d 585, 589-90 (Mo. App. S.D. 2021). Viewed in the light most favorable to the verdict, the evidence at trial was as follows.

Victim lived in a house on Broadway Street in Sikeston, which also doubled as a beauty salon. On Friday, September 15, 2023, a woman who regularly worked as a household aide ("R.C.") arrived at Victim's house. Victim customarily left the door unlocked to permit R.C. to enter. However, that morning the door was locked and Victim did not answer the door, nor did she answer calls from the agency that employed R.C. The employment agency instructed R.C. to go to her next client, which she did.

The following Monday, September 18, 2023, R.C. again reported to Victim's house and knocked on the door. Again, Victim did not answer. This time the door was unlocked. R.C. cracked the door and asked if Victim was there. Not getting an answer, R.C. walked in, thinking Victim might be asleep, but found the kitchen was a "disaster" and it "looked like somebody had fought." R.C. called her employment agency, which instructed her to leave the house and call the police, which she did.

Arriving officers found the trunk of Victim's car was left open and contained a box of blue latex gloves and cleaning supplies. They opened Victim's kitchen door adjacent to the driveway, and found the kitchen was covered in blood, there were blood soaked rags and cloths, the kitchen table was flipped over, and there was white AJAX cleaning powder covering the floors and counters. A hammer, a pair of scissors, and a knife were in the kitchen sink.

Victim's body was found wrapped in blankets on the floor between the kitchen and the room that was used as a salon. Victim was bound with duct tape and a dog leash. She had several deep stab wounds and head injuries. An autopsy later revealed that Victim died "due to a combination of sharp and blunt force injuries to the head, along with asphyxiation."

In the house, officers found a partial pack of cigarettes, some partially burned cigarettes, latex gloves with blood on them and an empty roll of duct tape. Victim's cell phone and car keys were found in the tank of Victim's toilet. Another phone, that was later determined to be Appellant's cell phone, was in the toilet bowl. The partially burned cigarettes were collected by police and taken to a lab in Springfield for a "rush" DNA analysis and a search through a national database. That DNA search revealed a match to Appellant. The bloody gloves were taken to the crime lab in Cape Girardeau where analysis showed a mixture of Victim's and Appellant's DNA.

Forensic analysis of Victim's phone found that the last time she logged into her account was Thursday night, September 14, 2023, at 9:45 p.m. and the last phone call or text from Victim's number was made at 7:04 p.m. that evening. All calls to her phone thereafter went straight to voice mail.

Cell phone data showed that on Wednesday, September 13, 2023, "[t]he cell phone attributed to [Appellant] and the cell phone attributable to [Victim] were both traveling north up to Cape Girardeau" in the same car. Victim's car was recorded there on that date by a license plate reader, and surveillance footage showed the car pulling into the driveway of Appellant's sister's home in Cape Girardeau. That address was listed as Appellant's address on some of his records. One of Appellant's family members testified that Appellant had been driving Victim's vehicle in Cape Girardeau.

On September 17 or 18, 2023 Appellant gave $1,000 to a friend ("J.R.J.") who he stayed with sometimes, because J.R.J. needed money. Appellant also took J.R.J.'s daughters shopping to buy shoes and gave them money. When the daughters asked where he got the money, Appellant "said he hit it[.]" While at J.R.J.'s house, Appellant cleaned out the car he was driving and threw the trash in a trash can. J.R.J. went through the trash and saw a pill bottle with Victim's name on it. Defendant told J.R.J. to just get rid of it.

On September 23, Appellant drove to Springfield and proposed to his girlfriend, ("M.C.") by giving M.C. two rings and a pendant. Appellant told M.C. that the gold ring

was his grandmother's and he had bought the other ring for her. Victim's sister and daughter testified that the jewelry belonged to Victim.

Appellant was arrested in Cape Girardeau on September 28, 2023. Appellant denied knowing anyone who lived on Broadway Street in Sikeston and said he had never been to Victim's residence. Appellant denied knowing Victim and denied ever driving a car that belonged to Victim. Appellant denied ever speaking to Victim on a cell phone.

At a second interview the next day, Appellant was shown a photo of Victim and again denied knowing her, ever seeing her, or ever being at her residence. Police confronted Appellant with the picture from the license plate reader which showed Appellant in Victim's vehicle, information gathered from phone logs, and the DNA evidence that showed both he and Victim were inside Victim's residence. Police told Appellant that he was "going to be charged or you are charged with this crime. And we are giving you the opportunity to talk to us." Appellant responded, "Sounds to me like you got everything you need. Why do you need me[?]"

Appellant did not testify at trial. A jury found Appellant guilty of murder in the first degree, kidnapping in the second degree and armed criminal action. The trial court sentenced Appellant to imprisonment for life without the possibility of parole for murder, seven years for kidnapping, and 30 years for armed criminal action, to be served consecutively. The trial court also imposed a $10,000 fine. Appellant filed a timely notice of appeal.

Point 1 – Request for Mistrial

In point 1, Appellant alleges the trial court abused its discretion in denying Appellant's request for a mistrial, after a witness voluntarily testified that Appellant had been released from prison, thereby indicating to the jury he had committed prior criminal offenses.

Appellate courts review a trial court's refusal to grant a mistrial for abuse of discretion. ***State v. Barton***, 240 S.W.3d 693, 703 (Mo. banc 2007). "The ruling on a request for a mistrial is left to the sound discretion of the trial court because it is in the best position to observe the impact of the problematic incident." ***State v. Ross-Garner***, 729 S.W.3d 10, 17 (Mo. App. W.D. 2026) (quoting ***State v. Eaton***, 563 S.W.3d 841, 844 (Mo. App. E.D. 2018)). An abuse of discretion occurs only when the trial court's ruling is "clearly against the logic of the circumstances" and is "so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." ***Id.*** Review is for prejudice, not mere error; the error must be so prejudicial that it deprived the defendant of a fair trial. ***Id.*** In analyzing the prejudicial effect of such a reference, courts examine the following factors:

> 1) whether the statement was, in fact, voluntary and unresponsive to the prosecutor's questioning or caused by the prosecutor; 2) whether the statement was singular and isolated, and whether it was emphasized or magnified by the prosecution; 3) whether the remarks were vague and indefinite, or whether they made specific reference to crimes committed by the accused; 4) whether the court promptly sustained defense

> counsel's objection to the statement and instructed the jury to disregard the volunteered statement; and 5) whether, in view of the other evidence presented and the strength of the State's case, it appeared that the comment played a decisive role in the determination of guilt.

State v. Marley, 598 S.W.3d 204, 215-16 (Mo. App. W.D. 2020) (quoting ***State v Meyers***, 333 S.W.3d 39, 43-44 (Mo. App. W.D. 2010)). Thus, a mistrial is considered a drastic remedy used only in the most extraordinary circumstances when grievous error cannot otherwise be remedied. ***Id.***

At trial, the State called a former girlfriend of Appellant ("A.B.") as a witness under subpoena and body attachment. A.B. and Appellant have an adult child together. Appellant had reached out to A.B. about getting in contact with their child. During examination, the State asked A.B. "Well, do you know about when he started reaching out with you?" A.B. responded "Actually when he was released from prison around Christmas time." Trial counsel objected and counsel approached the bench. Trial counsel requested a mistrial. The trial court reserved a ruling until the close of all evidence. Testimony continued and there were no further references by A.B. to prison or to other criminal behavior.

After the close of all evidence, the trial court overruled the request for a mistrial. The trial court suggested the possibility of a limiting instruction. Trial counsel stated he would "stand on the record. I don't want to re-ring a bell that has already been rung."

"When a witness unexpectedly volunteers inadmissible information, the action called for rests in the trial court's discretion." ***Ross-Garner***, 729 S.W.3d at 17

(quoting ***State v. Moore***, 687 S.W.3d 1, 10 (Mo. App. W.D. 2024)). In the instant case, the reference was brief, vague and occurred only once. Further, trial counsel did not move to strike the testimony and specifically declined a curative instruction. "The fact that a defendant limits his request for relief to that of a mistrial rather than making a request for a less drastic corrective action cannot aid him." ***State v. Newton***, 689 S.W.3d 785, 791 (Mo. App. S.D. 2024) (quoting ***State v. Vickers***, 560 S.W.3d 3, 28 (Mo. App. W.D. 2018)).

The isolated reference was not prejudicial given the extensive evidence of Appellant's guilt, including DNA evidence at the scene, cell phone location evidence, Appellant's possession and use of Victim's jewelry, Appellant's denial that he knew Victim or was in her home, and Appellant's possession of a pill bottle with Victim's name on it. Under these circumstances, the trial court did not abuse its discretion in denying the request for mistrial. *See* ***Ross-Garner***, 729 S.W.3d at 17 (witness's comment that defendant had probation officer did not require mistrial); ***Moore***, 687 S.W.3d at 10 (officer's reference to defendant having probation and parole officer did not warrant mistrial); ***Marley***, 598 S.W.3d at 215 (mistrial not required when victim explained she did not wish to call police as defendant "just got out"). Point 1 is denied.

Point 2 – Objection to Reference to "Violent Past"

Appellant alleges in point 2 that the trial court abused its discretion in overruling trial counsel's objection to the testimony of J.R.J. that J.R.J. and his wife were afraid of Appellant due to Appellant's "violent past." Appellant argues this testimony was impermissible evidence of prior criminal offenses and/or bad acts, especially in light of the volunteered statement addressed in point 1.

Trial courts have broad discretion in admitting or excluding evidence during a criminal trial. ***State v. Wood***, 580 S.W.3d 566, 574 (Mo. banc 2019).

> Admission of evidence by the trial court is reviewed by this Court for abuse of discretion. A trial court's discretionary rulings are presumed correct and the burden of overcoming the presumption is on the defendant. Regardless, "[e]rrors in admitting evidence require reversal only when prejudicial to the point that they are outcome-determinative." Outcome-determinative prejudice is a judicial finding that but for the erroneously admitted evidence, there is a reasonable probability the jury would have acquitted the defendant. This Court reviews the trial court's evidentiary ruling for outcome-determinative prejudice, not mere error.

State v. Henry, 696 S.W.3d 59, 67 (Mo. App. S.D. 2024) (internal citations omitted).

J.R.J. completed his direct testimony without incident. After his direct testimony, trial counsel cross-examined J.R.J as follows:

> [Trial counsel:] You said that he had a private number. You never got a number called to. Right?
>
> [J.R.J.:] I don't remember making that exact statement.
>
> [Trial counsel:] So you don't remember saying, Why are you calling me from a private number? To them?

[J.R.J.:] I remember saying to him and them I believe it -- my memory is not letting me remember that.

[Trial counsel:] Has something happened to you that affects your memory?

[J.R.J.:] Other than being scared to death of the guy, no, sir.

….

[Trial counsel:] So, if we understand everything you are saying, this is a person that you are scared to death of and you let him come and spend the night at your house? Yes or no?

[J.R.J.:] I did.

[Trial counsel:] Okay. So this person that you're supposedly scared to death of and you took money from? Yes or no?

[J.R.J.:] I was scared to death of him but I took the money. Yes, sir.

Shortly thereafter the trial court had an extensive side bar. The State alleged trial counsel opened the door to evidence to explain the state of mind of J.R.J. and his credibility and the State should be allowed to ask J.R.J. of his knowledge of Appellant's prior murder conviction. The trial court specifically disagreed with the State, indicating that it would allow limited questioning regarding Appellant's violent past but would not allow any reference to a prior conviction or murder. On redirect the State elicited the following testimony:

[State:] You had testified that you were afraid of [Appellant] because you have knowledge of his violent past?

[J.R.J.:] Correct.

[Trial counsel:] Judge, I object to that.

THE COURT: It is noted and overruled at this time.

[Trial counsel:] Thank you. I want [to] make sure the record is clear that it is continuing.

THE COURT: It is.

[State:] Fearful because of violent past?

[J.R.J.:] Yes.

[State:] Was your wife also fearful of [Appellant] because of that violent past?

[J.R.J.:] Correct.

[Trial counsel:] Objection. That calls for speculation.

THE COURT: I will sustain.

Appellant contends that this evidence constitutes impermissible evidence of prior crimes and/or bad character.

As a general rule, evidence of a defendant's uncharged crimes or bad acts is inadmissible to show a defendant's propensity to commit a crime. ***State v. Emery***, 701 S.W.3d 585, 603-05 (Mo. banc 2024). However, evidence of uncharged prior misconduct may be admissible to provide a jury with a complete picture of the circumstances surrounding the charged crime. ***State v. Key***, 437 S.W.3d 264, 270 (Mo. App. W.D. 2014). "To violate the rule prohibiting evidence of other crimes or misconduct by the accused, the evidence must show the accused committed, was accused of, was convicted of, or was definitely associated with, the other crimes or misconduct." ***State v. Buechting***, 633 S.W.3d 367, 381 (Mo. App. E.D. 2021). If a defendant raises an issue

directly or by implication, the State can present otherwise inadmissible testimony to counteract the negative inference the defense has injected into the case. ***Id.*** "In other words, a defendant may not provoke a reply to his own argument and then claim error." ***Id.*** (quoting ***State v. Fassero***, 256 S.W.3d 109, 118 (Mo. banc 2008).

Trial counsel cross-examined J.R.J. at length in an attempt to prove that he was not really afraid of Appellant. Trial counsel opened the door and the State could then elicit the reason for that fear, which was Appellant's "violent past." The trial court limited the State in what it could ask and the jury did not hear any information regarding Appellant's prior murder conviction. The trial court did not abuse its discretion in admitting this limited evidence. Also, for the reasons outlined in point 1, there was no prejudice due to the overwhelming evidence of Appellant's guilt. Point 2 is denied.

Point 3 – Opening Statement – Plain Error

Appellant's third point alleges the trial court plainly erred in failing to *sua sponte* instruct the jury to disregard the State's opening statement. Specifically, Appellant alleges the State's opening statement was "designed merely to inflame the passions and prejudices of the jury[.]"

We first note that Appellant acknowledges this issue was not properly preserved, either by objection or inclusion in a motion for new trial. "[A]ppellate courts generally do not review unpreserved claims of error." ***State v. Jones***, 725 S.W.3d 577, 582 (Mo.

banc 2025); *see also* ***State v. Harper***, No. SD38807, 2026 WL 1492397, at*7 (Mo. App. S.D. May 28, 2026). "Rule 30.20 alters this guiding principle, allowing appellate courts to review specified unpreserved claims of error in criminal proceedings." ***Jones***, 725 S.W.3d at 582. Even so, plain error review is discretionary. ***Id***. at 584.

Plain errors are "facially evident, obvious, and clear." ***Id.*** at 583. "Plain errors affecting substantial rights," by their very definition, "are plainly erroneous, inherently self-evident, discernible, and undeniable, affecting the basic rights of a litigant. They are the type of errors on which the circuit court should have taken corrective action because, left uncorrected, a manifest injustice may result." ***Id.***

The burden to prove a plain error affecting substantial rights rests with the appellant. ***Id.*** "An appellate court will conduct review under Rule 30.20 only when the appellant's request for plain error review establishes facially substantial grounds for believing that the trial court's error was evident, obvious, and clear, and that manifest injustice or miscarriage of justice has resulted." ***Id.*** (internal quotations and citation omitted). "Unless the appellant makes this facial showing, this Court will decline to review for plain error under Rule 30.20." ***Id.***; *see* ***State v. Brandolese***, 601 S.W.3d 519, 526 (Mo. banc 2020); *see also* ***Harper***, *2026 WL 1492397, at *7*. "[C]ertain claims are ill-suited for plain error review, such as when reasonable trial strategy is likely to have contributed to or caused the alleged error to occur." ***State v. Burkett***, 725 S.W.3d 565,

571 (Mo. banc 2025). This includes statements in closing argument and instructional error. ***Id.*** at 574, 576.

Appellant challenges the following portion of the State's opening statement:

> A notable movie quote is, In space no one can hear you scream. What would be worse than screaming when no one can hear you? It is pretty scary.
>
> What about being unable to scream? Because your faces [*sic*] is wrapped in multiple layers of duct tape covering your mouth, your nose and your eyes. Your hands are duct taped behind your back. Your ankles are duct taped with a dog leash wrapped around for good measure.
>
> You cannot see. You cannot breath[e]. You cannot scream. You are being beaten and stabbed. That would be horrific. And that is how [Victim] spent the last moments of her life.

Appellant alleges this statement "injected into the minds of the jurors matters not proper for their consideration" and the "comments were an improper appeal to the passions and prejudices of the jurors."

"The primary purpose of an opening statement is to inform the judge and jury of the general nature of the case, so they may appreciate the significance of the evidence as it is presented." ***State v. Thompson***, 68 S.W.3d 393, 394 (Mo. banc 2022). The State may not personalize an argument to the jury. *See* ***Gibbs v. State***, 359 S.W.3d 529, 536 (Mo. App. E.D. 2012) (pertaining to closing argument); ***State v. Storey***, 901 S.W.2d 886, 901 (Mo. banc 1995). The State's comments in the instant case certainly wade into that territory. However, because a "circuit court cannot be convicted of error for something it was never asked to do, appellate courts do not generally review unpreserved claims of

error." ***Burkett***, 725 S.W.3d at 571. "Courts will grant plain error review on the basis of an error in the prosecutor's opening statement only when the defendant can show that the prosecutor's remark had a decisive effect on the jury's determination." ***State v. Powell***, 286 S.W.3d 843, 850 (Mo. App. W.D. 2009) (internal quotations and citation omitted); *see also* ***Burkett***, 725 S.W.3d at 576 (pertaining to closing argument). "This is a difficult standard to meet because the courts have concluded that the impact of the prosecutor's opening statement diminishes after the parties introduce evidence and give their closing arguments." ***Powell***, 286 S.W.3d at 850.

The Supreme Court of Missouri recently addressed plain error review regarding statements in closing argument. In ***Burkett***, the State made impermissible misstatements of law in his closing argument. 725 S.W.3d at 575. Defense counsel did not object or request a curative instruction. ***Id.*** The Court noted that "withholding an objection to an improper argument is often a strategic decision made by counsel." ***Id.*** at 576. The Supreme Court held in ***Burkett*** that the "circuit court actions should not be reviewed for plain error when counsel may have elected not to react or draw attention to the alleged improper argument." ***Id.*** Also, the Court noted that an improper argument warrants reversal only if it had a "decisive effect on the jury determination." ***Id.*** Ultimately, the Court found that while the circuit court may have erred by not correcting the State's improper argument, the error did not warrant plain error review. ***Id.*** at 577

As opposed to Burkett, which dealt with a closing argument, the concerning statements here occurred in the State's opening statement. However, the analysis is similar. Thus, we decline to engage in plain error review of Appellant's complaints about the State's opening statement. Appellant has not demonstrated that the trial court committed any evident, obvious or clear errors. Moreover, Appellant has not met his burden of demonstrating facially substantial grounds for believing the alleged errors resulted in a manifest injustice or miscarriage of justice. The trial court properly instructed the jury that statements of counsel were not evidence. The State's comments certainly did not have a "decisive effect" on the jury's determination. *See* ***Powell***, 286 S.W.3d at 850-52**.** Thus, plain error review is not appropriate in this instance. *See* ***Soliben***, 621 S.W.3d at 593. We decline plain error review of point 3.

Point 4 – Written Judgment

Appellant's final point alleges the trial court's written judgment failed to accurately memorialize the oral pronouncement of Appellant's sentence for Count 1. The State concedes the sentencing error in the judgment and agrees the matter should be remanded to the trial court to correct the error.

"The circuit court's written judgment should reflect its oral pronouncement of sentence before the defendant." ***State v. Homer***, No. WD 87970, 2026 WL 1291064, at *5 (Mo. App. W.D. May 12, 2026) (quoting ***State v. Moots***, 727 S.W.3d 792, 793 (Mo. App. W.D. 2025)). "If there is a material difference between the court's oral

pronouncement of sentence and the written judgment, the oral pronouncement controls." ***Id.***

"The failure to accurately memorialize the decision of the trial court as it was announced in open court is a clerical mistake." ***State v. Robinson***, 685 S.W.3d 32, 34 (Mo. App. W.D. 2024). Clerical errors in the sentence and judgment in a criminal case may be corrected by a *nunc pro tunc* order. ***Id.*** "Remand is the appropriate remedy." ***State v. Rost***, 690 S.W.3d 573, 591 (Mo. App. S.D. 2024) (quoting ***State v. McClurg***, 543 S.W.3d 78, 83 (Mo. App. S.D. 2018)).

The trial court's oral pronouncement of sentence for Count 1 was life imprisonment without parole. However, the written judgement and sentence memorialized that as 999 years. Sentences of life and 999 years are materially different because, among other reasons, they have a different effect in determining parole eligibility. ***Homer***, 2026 WL 1291064 at *5. Thus, we reverse and remand this case to the trial court solely for the purpose of entering an order *nunc pro tunc* amending its written judgment to conform to its oral pronouncement of Appellant's sentence as to Count 1. Point 4 is granted.

Conclusion

We reverse the judgment as to Count 1 only and remand to the trial court solely for it to enter a judgment *nunc pro tunc* amending its written judgment to conform

Appellant's sentence on Count 1 to the trial court's oral pronouncement of sentence. In all other respects, Appellant's appeal is denied, and the judgment is affirmed.

BRYAN E. NICKELL, J. – OPINION AUTHOR

JACK A. L. GOODMAN, J. – CONCURS

MATTHEW P. HAMNER, J. – CONCURS